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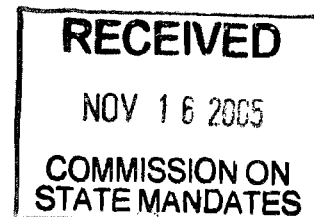
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November 15, 2005

0160-00031-0001

Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814



Dear Sir:

In response to your request for initial comments from interested parties, attached is the City of Los Angeles' opening brief relative to the Commission on State Mandates' reconsideration of the Peace Officer Procedural Bill of Rights test claim, Case Number 05-RL-4499-01.

Sincerely,

William T Fujioka
City Administrative Officer

WTF:ECL:01060029a

Attachment



OPENING BRIEF

On behalf of City of Los Angeles

Case no. 05-RL-4499-01

Government Code sections 3300 through 3311, as added and amend by Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174, and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675

Reconsideration of Prior Decision: Peace Officer Procedural Bill of Rights

Interested Party City of Los Angeles submits the following pursuant to the notice issued by Commission on October 19, 2005.

INTRODUCTION

In 1999, this Commission issued its Statement of Decision in the Peace Officer Procedural Bill of Rights (POBOR) test claim finding that the legislation created a reimbursable state mandate. (Administrative Record (AR) at pp. 860-887.) The test claim legislation provides safeguards and protections to be employed for the protection of peace officers that are subject of investigation or discipline. Of primary concern was the fact that these safeguards and protections are more expansive than those already in existence through statute, case law and the Constitution. Indeed, as evidenced in the Statement of Decision, the Commission took particular care to root out those protections that were not duplicative of pre-existing due process rights to delineate the scope and extent of the newly state-mandated activities. (AR at pp. 861-871 and SOD at pp. 2-12.)

In 2005, the Legislature requested, though AB 138, that the Commission address the applicability of the recent decision of the California Supreme Court in *San Diego Unified v. Commission on State Mandates* (2004) 33 Cal.4th 859, [16 Cal.Rptr.3d 466]. That case turned on the issue of whether an action is a discretionary and therefore not a state-mandated activity. The activities of the POBOR program were properly found by the Commission to be reimbursable state-mandated activities were within the meaning of Article XIII B, section 6, of the California Constitution and the recent case law does nothing to disturb that initial decision.

1. San Diego Unified Supports Commission's Finding That POBOR is a State-Mandated Program

At issue in *San Diego Unified* was whether there were reimbursable mandates within the education codes which set forth procedures for the mandatory and discretionary expulsion of students.

The Court first looked at mandatory expulsions. The question posed by the Court was whether the state law mandate sets forth a new program of higher level of service in light of the federal requirements. (16 Cal.Rptr.2d at 474.) The Court found a higher level of service by turning to the intent of the law to create safer schools. (*Id.* at 477-478.) Next the Court tackled the issue of whether some costs are not state-mandated but federally mandated finding that the expulsion which triggers the hearing was state mandated. Without the state statute, the principal would have the discretion to expel. (*Id.* at 479-482.) Thus the Court found a reimbursable state mandate.

In looking at discretionary expulsions, the Court concluded that there is no new program as the concept of discretionary expulsion dates back to before 1975 and does not require a higher level of service. (16 Cal.Rptr.2d at 483.) Next, assuming that the hearing requirement is new, the Court opts not to apply *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 [200 Cal.Rptr. 642], the controlling case on the issue of voluntary action and instead applied *County of Los Angeles v. Department of Industrial Relations* (1989) 32 Cal.App.4th 805, finding that the requirements of the state statute are incidental to and part of the underlying federal mandate. (*Id.* at 488.)

2. There Has Been No Change in Law on the Issue of Discretionary Action

Applying the *San Diego Unified* analysis, the first issue is whether the activities involved in POBOR are mandatory or discretionary. As noted above, the leading case in 1999, when the POBOR test claim was before the Commission, was and remains *City of Merced, supra*, 153 Cal.App.3d 777 [200 Cal.Rptr. 642] which stands for the proposition that if the decision to initiate a program was discretionary, it is not state-mandated. It is worthy of note that this issue was not raised by the parties to the original POBOR test claim nor was it raised by Commission staff. Simply put, the matter was not raised because it was not relevant to the test claim — the POBOR program is mandatory.

The question, then, is whether *San Diego Unified* amended, modified or overruled the holding in *City of Merced*. The Court did not use the reasoning of *City of Merced* in its analysis. The only discussion, as explained below, was limited to language that sought to rein in the application of *City of Merced* to other cases by establishing a reasonableness standard but the Court fell short of overruling it. (16 Cal.Rptr.2d at 485-486.) The Court, however, relied heavily on

City of Merced upholding the case and applying it without modification in its analysis in *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 [134 Cal.Rptr.2d 237, 245-250], another school district mandate case heard the prior year. Therefore, since *San Diego Unified* did not overrule *City of Merced*, there has been no change in law regarding discretionary action since 1984 and there is nothing for the Commission to reconsider on this issue.

3. The Commission Thoroughly Addressed the Issue of Federal Mandates

Continuing with the *San Diego Unified* analysis, the next issue is the interplay between pre-existing federal requirements and the subject legislation. As explained above, this issue was of primary concern to the Commission as set forth in its Statement of Decision within which the various state-mandated activities within the POBOR program are meticulously culled from the federally mandated activities. Indeed, there are no pre-existing federal mandates that were not examined by the Commission. Thus all federally mandated activities were eliminated from consideration in the Statement of Decision and the resulting parameters and guidelines.

4. County of Los Angeles is Inapplicable to the POBOR Program

Assuming, *arguendo*, that participation in the POBOR program can be seen as discretionary, the next issue, according to the *San Diego Unified* analysis, is whether the requirements of the POBOR statutes are incidental to and part of the underlying federal mandate as set forth in *County of Los Angeles v. Department of Industrial Relations, supra*. In this case, the federal mandate is the due process clause of the Constitution. (AR at pp. 863-867 and SOD at pp. 4-8.) Obviously, these statutes are not part of the U.S. Constitution. Thus POBOR cannot be considered part of a federal program.

5 City of Merced is Inapplicable to the POBOR Program

Finally, assuming, *arguendo*, that the POBOR program activities can be seen as discretionary, *City of Merced* does not apply. In *San Diego Unified*, the Court was critical of such misapplication. It stated:

Upon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs. Indeed, it would appear that under a strict application of the language in *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent

contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley, supra*, 190 Cal.App.3d 521, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537-538.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ — and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra*, 153 Cal.App.3d 777, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result. (16 Cal.Rptr.2d at .)

The intent of POBOR is clearly stated in Government Code section 3301, and as quoted in the Statement of Decision:

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of the stable employer-employee relations, between public safety employees and employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all public safety officers, as defined in this section, within the State of California. (AR at pp. 861 and SOD at pp. 2.)

To use the reasoning of *City of Merced* to defeat the reimbursability of the POBOR program would be in contravention of the clearly stated intent of the Legislature. POBOR cannot be considered a discretionary program.


CONCLUSION

The Legislature requested this Commission to look at the POBOR test claim in the light of new case law. This new case law, however, made little change to existing law on discretionary activities and reiterated existing law on state mandates versus federal mandates. Both of these issues as set forth in the *San Diego Unified* decision were already addressed by the Commission in its Statement of Decision as issued in 1990. Moreover, case law does not support a finding that participation in the POBOR program is discretionary. POBOR is a program of reimbursable state-mandated activities within the meaning of Article XIII B, section 6, of the California Constitution.

CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and correct, except as to those matters stated upon information and belief and as to those matters, I believe them to be true.

Executed this 15th day of November, 2005, at Los Angeles, California, by:



William T. Fujioka,
City Administrative Officer
City of Los Angeles